

## “Why Do Bad Things Happen to Good Lawyers?”

Chief Judge Brendan Linehan Shannon

Judge Christopher S. Sontchi

Judge Laurie Selber Silverstein

Moderator: Michael B. Joseph, Esquire Chapter 13 Trustee

### 1. Conflicts of Interest

#### a. Joint debtor representation:

**Husband & wife meet with attorney. Couple informs attorney that they file married but separate tax returns, except husband has not filed his returns in many years and is self-employed and has employees. He also hasn't paid or filed withholding taxes for the past 2 years. The only joint debt is their home mortgage that is delinquent and in foreclosure.**

Delaware Rules of Professional Responsibility Rule 1.7-informed consent okay?

Comment:

#### b. Representation of exes-ex-spouse; ex business partners

**Attorney represents H & W in a Chapter 13 case that has been pending for 3 years. Couple separates and files for divorce. Husband desires to remain in chapter 13 and complete the plan. Wife wants to convert to Chapter 7 and get a discharge. There are no issues of alimony or property division.**

**Comment to Delaware Rule** [4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

### 2. Local Counsel; Appearance counsel; Unauthorized practice of law (not admitted in jurisdiction): Fee sharing

**Local Counsel: Delaware attorney for creditor enters appearance and relies on outside counsel for preparation and accuracy of all documents.**

## L.R. 9010-1 Bar Admission

- (c) Association with Delaware Counsel Required. Unless otherwise ordered, an attorney not admitted to practice by the District Court and the Supreme Court of the State of Delaware may not be admitted pro hac vice unless associated with an attorney who is a member of the Bar of the District Court and who maintains an office in the District of Delaware for the regular transaction of business ("Delaware counsel"). Consistent with CM/ECF Procedures, Delaware counsel shall be the registered users of CM/ECF and shall be required to file all papers. Unless otherwise ordered, Delaware counsel shall attend proceedings before the Court.
  
- (f) Standards for Professional Conduct. Subject to such modifications as may be required or permitted by federal statute, court rule or decision, all attorneys admitted or authorized to practice before this Court, including attorneys admitted on motion or otherwise, shall also be governed by the Model Rules of Professional Conduct of the American Bar Association, as may be amended from time to time.

Appearance only counsel

**Attorney A consistently does not appear for Section 341 meetings or court hearings for his cases. Instead he contracts with Attorney B who appears and who states that she is only appearing for the limited circumstance. Attorney B receives a nominal payment for each appearance.**

**Proper? What further is required-informed consent of the debtor and full disclosure in the initial retention?**

Internet client solicitation services:

**Company provides advertising services to law firms for internet searches, obtains client information and forwards that to the law firm to follow up and contact the potential bankruptcy client. If retained, the Company charges the bankruptcy \$250 for the referral.**

See 11 USC Section 504

**How about if the referral agent is an out of state attorney and is associated with the Delaware lawyer? Does this make a difference as to fee sharing?**

3. What is required of an attorney to search public records?

**Debtor does not disclose prior bankruptcy cases: PACER search**

**Debtor does not disclose he transferred his 100% interest in his home to non-filing spouse within the year prior to filing, and home would have non-exempt equity: title or lien search**

**Debtor's home has several recorded liens/judgments not disclosed: Attorney saw there was a garnishing creditor listed but assumed it was for a medical debt. If the actual judgment was reviewed attorney would have discovered it was a non-dischargeable claim for fraud. See Dignity Health v Seare 493 BR 158 (Bankr D Nev 2013)**

4. Attorney's Responsibility to know/anticipate certain bankruptcy related tax consequences

**Debtor's attorney failed to correctly calculate assessed dates for taxes and prematurely filed bankruptcy and rendering certain tax claims non-dischargeable, while waiting a bit longer could satisfy the requirements of Section 507(a)(8). See in Re Saunders, 2003 LEXIS 1819 (Bankr SD Fla 2003) Unpublished opinion**

**Debtor filed action against Chapter 7 attorney on various grounds including failure to properly schedule priority tax claims or provide full information and advice for failure to timely file income tax returns. See for example Hutchinson v Smith 417 So. 926 (Miss., 1982)**

5. Attorney's Responsibility for Pre-Bankruptcy Planning such as chapter choice or time of filing; serial or abusive filing;

**Debtor fails to fully disclose all of her debts, and after commencing a Chapter 13 case her attorney discovers that the debts under Section 109(e) eligibility exceed the limits**

**Debtor fails to disclose all income received within 6 months of filing Chapter 7. If disclosed the debtor would be above median income and be required to file a Chapter 13**

**Attorney should calculate date of any prior bankruptcy and eligibility for Discharge**

6. Important Bankruptcy Deadlines: Statutes of Limitation or Repose; Tolling; Section 108 Extension of Time

**Claims Bar Date**

**Discharge & dischargeability objection deadline**

**Deadline for Objections to Exemptions**

**Deadline for Debtor's statement of intent**

**Deadline to file Appeals**

**Excusable neglect:**

The US Supreme Court in the **Pioneer** case held the excusable neglect "determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include ... the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."

**Extend for late filed claims? Other actions?**

**Proof of claim case-deadline met but with wrong information:**

**Creditor files proof of claim within deadline, but mistakenly as unsecured. In fact there is a valid judgment lien. Chapter 13 plan is confirmed without objection, claim is paid per the plan and debtors received a discharge. See In re: Barrera 2016 WL 6990876 (Bankr MD Fla Nov 2016) Court held that secured creditor waived its lien and granted debtor's motion to avoid.**

**7. Filing of Petition/Documents & Wet Signature**

**Debtor's first case was dismissed and then attorney filed a 2<sup>nd</sup> case due to an imminent foreclosure. However, the attorney never obtained the debtor's signature on the 2<sup>nd</sup> petition or any of the initial filings in the case. The Eighth Circuit ruled that an attorney must know for certain that the client wishes to file for bankruptcy before petition is filed. Also, because there was no signature of the debtor, the oath as to the veracity of the schedules was also not attested to. Rule 9011 violation upheld but did not sanction attorney. See in Re: Phillips 433 F 3rd 1068 (8<sup>th</sup> Cir 2006)**

**See also In Re: T.H. 529 BR 112 (Bankr ED Va 2015) where Court sanctioned and suspended attorney for numerous deficiencies including failure to obtain a wet signature on the petition signifying the debtor's understanding and specific authorization to file the bankruptcy.**

**L.R. 9011-4      Signatures.**

- (a) Any motion, pleading or other document requiring a signature must, following the signature, include the address and telephone number of the attorney or pro se filer.
- (b) Any motion, pleading or other document requiring a signature that is electronically filed by a registered CM/ECF user must be filed as either (a) a document containing the signature of the person(s) signing said document or (b) a document displaying the name of the person(s) signing said document, preceded by an "/s/" ("electronic signature") and typed in the space where the

signature would otherwise appear (e.g., "/s/ Jane Doe"). The electronic signature of the person on the document electronically filed shall constitute the signature of that person for purposes of Fed. R. Bankr. P. 9011, and the use of a person's password to file a document electronically shall not constitute the signature of, or a representation to the court by, the person whose password is used for such electronic filing for purposes of Fed. R. Bankr. P. 9011. In the absence of a signature on a document electronically filed, the CM/ECF password used to file the document shall constitute a signature for purposes of Fed. R. Bankr. P. 9011.

- (c) The filing of a proof of claim electronically with the clerk shall constitute the filing claimant's approved signature by law. Electronic claimants are not required to be registered CM/ECF users. Electronically filed proofs of claim are deemed signed upon electronic submission with the Clerk.

## 8. Engagement letters

**Chapter 7 case where law firm filed petition but not the schedules or related documents to commence the proceeding. The law firm also filed a petition to pay the filing fees in 2 installments. The debtor had signed an engagement agreement that included requirements for payment of the balance of attorney's fees due. Unfortunately the debtor did not pay the attorney's fees when due and counsel made calls, sent emails and a letter threatening dire consequences in the event the fees were not paid. This included the possibility the case would be dismissed without a discharge. The debtor complained to the Court, and the US Trustee about these collection tactics, and eventually received a discharge. The engagement agreement included among other things that if fees were not fully paid upfront, only a "bare bones" petition would be prepared. The debtor also signed an authorization to the attorney to allow future deductions from debtor's debit card. The Court held the engagement agreement created an irreconcilable conflict of interest with debtor as a client. See In Re: Grimmer 2017 Bankr. LEXIS 1492 (Bankr. D Idaho 2017)**

9. Communication breakdown;

Attorney-Client Relationship is Completely Broken (Rare)

**You cannot establish or maintain an attorney-client relationship. The Attorney-Client relationship is not difficult—it is impossible. For example, the client is specifically threatening you or your loved ones with harm and you find the threats genuinely unsettling. Whether or not the client wants new counsel, you want to withdraw, not because you dislike the client, find him offensive, or have serious conflicts, but because it has become impossible to communicate with him. The attorney-client relationship has completely broken down from your point of view.**

The Difficult Client (More Common)

**The typical situation is that the client's demand that you withdraw is a function of completely unreasonable and unrealistic expectations, naïve and ill-informed legal theories, or absurd proposed courses of actions. The clients want you to argue X, or file Y, or do Z, when X, Y and Z AT BEST will weaken the overall presentation of the client's case to the reviewing court. The client may be unpleasant or obnoxious, but that is not the problem. The problem is that you cannot do what the client wants and fulfill your duty of zealous representation, or that what the client wants is simply impossible, and you cannot make the client understand.**

**In any Motion limit disclosure only to what is necessary to the specific situation. There are creative methods of suggesting that the client is difficult or paranoid without actually writing it. Remember, a lawyer still owes a client a continuing duty of loyalty even after the relationship ends.**

**L.R. 9010-2      Substitution; Withdrawal.**

- (a) Substitution. If a party in an adversary proceeding or a debtor in any case wishes to substitute attorneys, a substitution of counsel document signed by the original attorney and the substituted attorney shall be filed. If a trustee, debtor or official committee wishes to substitute attorneys or any other professional whose employment was subject to approval by the Court, a motion for retention of the new professional must also be filed.

- (b) Withdrawal. An attorney may withdraw an appearance for a party without the Court's permission (i) when such withdrawal will leave a member of the Bar of the District Court appearing as attorney of record for the party, or (ii) when the party (a) has no controversy pending before the Court and (b) the attorney certifies that the party consents to withdrawal of counsel. Otherwise, no appearance shall be withdrawn except by order on a motion duly filed, served on each party and served on the party client by registered or certified mail addressed to the client's last known address, at least fourteen (14) days before the motion is heard by the Court. The filer is not required to confer other than with its party client prior to filing the motion to withdraw.
- (c) Service. Substitutions and motions for withdrawal under this Local Rule shall be served (i) in an adversary proceeding, on all parties to the proceeding and (ii) in a bankruptcy case, on all parties entitled to notice under Fed. R. Bankr. P. 2002.
- (d) Effect of Failure to Comply. Until paragraph (a) or (b), as applicable, and paragraph (c) of Local Rule 9010-2 are complied with and an order, if necessary, is entered, the original attorney remains the client's attorney of record.

#### 10. Client infirm or elderly with a Durable POA

**Debtor's daughter consults with attorney about her mother and father who live independently in their home. Several years ago her parents took out a home equity loan and used the proceeds to pay their own bills, some of the daughter's bills, and for living expenses. They have not paid the loan in several years and are now facing foreclosure. Both of her parents are elderly and disabled. The daughter has a durable power of attorney that she has used to help them with their personal affairs. The daughter has also been paying herself several hundred dollars per month out of her parent's accounts.**

**Who will the attorney represent?**

**Is there a conflict?**



11. Redact Private Identifiers and Duty to Secure Private Confidential Information of the Client: Paper and Digital tax returns, personal record and documents:

**Bankruptcy Rule 9037 provides that unless otherwise ordered by the court, references to a person's social security number, taxpayer identification number, date of birth, financial account number, or a minor's name in an electronic filing shall only include the last 4 digits social security number or taxpayer identification number, the year of the individual's birth, the minor's initials, and the last 4 digits of a financial account number. Be sure to redact such information not only in the text of your filing, but also in any attached exhibits or documents. LR 9037-1 also sets forth requirements for redaction if PIN is found.**

**L.R 9037-1      Redaction of Personal Data Identifiers.**

- (a) Responsibility for Redaction. The responsibility for redacting personal data identifiers (as defined in Fed. R. Bankr. P. 9037) rests solely with counsel, parties in interest and non-parties. The Clerk, or claims agent if one has been appointed, will not review each document for compliance with this Rule. In the event the Clerk, or claims agent if one has been appointed, discovers that personal identifier data or information concerning a minor individual has been included in a pleading, the Clerk, or claims agent if one has been appointed, is authorized, in its sole discretion, to restrict public access (except as to the filer, the case trustee, the United States Trustee and the claims agent) to the document in issue and inform the filer of the requirement to file a motion to redact.
- (b) Method of Redaction. The filer of the document containing personal data identifiers shall, in accordance with CM/ECF procedures, file a motion to redact that identifies the proposed document for redaction by docket number or if applicable, by claim number. The filer shall submit, with the motion to redact, an exhibit containing the document to be substituted for the original filing.
- (c) Clerk's Action upon Filing. Upon filing of the motion to redact, the Clerk's Office will restrict the original image containing the personal data identifiers from public view (except as to the filer, the case trustee, the United States Trustee and the claims agent) on the docket.
- (d) Notice. The filer shall include a certificate of service at the time the motion to redact is filed, showing service to the following recipients: the debtor, anyone whose

personal information has been disclosed, the case trustee (if any) and the United States Trustee.

## **12. Open Questions:**

- A. Bankruptcy counsel discovers an error or omission in the schedules: Duty to report to the Court or trustee, or attorney client privilege**
- B. Bankruptcy closed and debtor discharged: counsel discovers error or omission in the schedules – ongoing duty or privileged?**
- C. Outside counsel not involved in Bankruptcy: This counsel does not represent the debtor but has paid or made a settlement distribution to a debtor that was not but should have been disclosed in the schedules: duty to report? Possible exposure for a disgorgement and turnover motion, and undoing of the settlement and/or releases?**